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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 155 52250 Office: VERMONT SERVICE CENTER Date: FEB 05 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a telecommunications company that seeks to employ the beneficiary as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the beneficiary does not possess the educational background required by the terms of the labor certification.

On appeal, counsel asserts that the director misinterpreted the job requirements, and that the beneficiary's work experience is the functional equivalent of a bachelor's degree in a computer-related field of study.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. 204.5(k)(2).

Part A ("Offer of Employment) of the labor certification application, Form ETA-750, shows the following "minimum education, training and experience" requirements in block 14:

> Education (number of years): 4
> College Degree Required: "Bachelor's (or equivalent)"
> Major Field of Study: "computer related field*"
> Experience in Job Offered: [left blank]
> Experience in Related Occupation: 5**
> Related Occupation (specify): "progressively more responsible experience developing information processing solutions"

The asterisk (*) refers to a separate notation, which reads "e.g. Computer Information Systems, Management Information Systems, Information Systems, Computer Science, Electrical Engineering, Engineering, math, or Business Administration with emphasis in information systems; or related field." The double asterisk (**) pertains to a notation that a "Master's degree in computer related field may substitute for Bachelor's degree plus two years' experience in developing information processing solutions."

On block 11 of the Form ETA-750B, Statement of Qualifications of Alien, the beneficiary indicates that he earned a Bachelor's degree in English in 1990 from the University of Madras. The beneficiary claims no other college degree. University documents in the record reflect course work in linguistics, prose, Shakespeare, fiction, and other topics typically associated with an English degree. None of the beneficiary's college-level course work appears to have been computer related.

Elaine Tang, the petitioner's immigration coordinator, states that the beneficiary "has approximately eleven years and four and a half months **progressively** more responsible work experience in the computer science industry." The record documents the beneficiary's extensive employment in the field.

An independent evaluation submitted with the petition offers the following assessment of the beneficiary's credentials:

> [The beneficiary's] Bachelor of Arts . . . is equivalent to three years toward a bachelor's degree in English from an accredited American university. It would yield approximately two years of lower-division undergraduate transfer credit toward a bachelor's degree in Computer Information Systems from an accredited university in the United States. . . .
>
> [The beneficiary's] combination of three years of post-secondary education and more than six years of professional-level work experience in software project management, programming and systems analysis gives him the equivalent of a bachelor's degree in Computer Information Systems.

The above evaluation was originally prepared in conjunction with an H-1B nonimmigrant visa petition. That nonimmigrant classification allows for the substitution of experience in place of an actual degree, as the evaluator notes by referring to the "three-for-one rule, where each year of missing university education requires three years of relevant professional-level work experience."

The director informed the petitioner that the beneficiary's bachelor's degree is "not [in] a related field to computer science." The director instructed the petitioner to submit further evidence regarding the beneficiary's educational background. In response, the petitioner submitted a letter in which counsel asserted:

> [T]here are really two separate questions in this interesting case. First, does the beneficiary meet the labor certification requirements. More specifically, when the requirement says "Bachelor's (or the equivalent)" does this mean the individual must have at least either a U.S. Bachelor's degree or an equivalent foreign degree; or can the requirement be met by a combination of education and experience equivalent to a Bachelor's degree. Second, if a person may satisfy the requirements for the job by a combination of education and experience, will that be enough . . . to justify EB-2 classification; OR does EB-2 classification require at the minimum a foreign degree equivalent to a U.S. Bachelor's degree, as the [request for evidence] states.

Counsel asserted that the petitioner believes both questions could be answered in the affirmative, but if the director disagrees on the second point, then the petitioner requests that the petition be considered under a lesser classification.

The director denied the petition, stating:

> The approved Labor Certification calls for a Bachelor's Degree (or equivalent) and five years o[f] progressively more responsible experience. The field of study must be [a] computer relate[d] field.
>
> The beneficiary holds a Bachelor's Degree in English, which is in no way related to Computer Science.

On appeal, counsel argues that the director "misinterpreted the employer's minimum requirements for the position." Specifically, counsel argues "the labor certification requirement for the job is a Bachelor's degree or the equivalent, not a Bachelor's degree or an equivalent degree. As such, the requirements may be satisfied by a combination of education and experience equivalent to a degree." There is evidentiary support for this assertion. Apart from statements in the record to the effect that the petitioner considers the beneficiary's work experience to be equivalent to a bachelor's degree, advertisements run by the petitioner indicate that the job requires a bachelor's degree in electrical engineering or computer science "or equivalent experience." Counsel's assertion, therefore, is clearly not an *ad hoc* explanation devised merely to answer the director's finding.

The above, however, necessarily forecloses the possibility that the position requires a member of the professions holding an advanced degree or the equivalent. The Service's regulation at 8 C.F.R. 204.5(k)(3)(i) states:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> > (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
> >
> > (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. 204.5(k)(2) states "*Advanced degree* means any United States academic or professional degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

From the above regulations, it is clear that while post-baccalaureate experience can serve in lieu of a master's degree, there is no such provision for experience to serve in lieu of the underlying bachelor's degree. The credential evaluation, discussed above, makes it clear that the beneficiary does not possess a foreign equivalent degree in computer science, English, or any other field; his

foreign degree is not equivalent to a U.S. baccalaureate. Therefore, this petition is deniable on its face because the petitioner cannot meet the basic evidentiary requirements.

Counsel asserts, on appeal, that the petition "should be approved at the least with EB-3 status," i.e. under one of the lower classifications defined by section 203(b)(3) of the Act. There is, however, no provision in statute, regulation, or case law which permits a petitioner to change the classification of a petition once a decision has been rendered. Counsel asserts that the director should have afforded the petitioner the opportunity to change the classification before the decision was rendered (as, indeed, counsel had requested prior to the denial of the petition). Such an opportunity would have been a courtesy; there is no requirement that the director do so. The director's failure to extend that courtesy is not grounds for appellate reversal of the director's decision or for a remand of the petition for further consideration.

Furthermore, the petitioner, through counsel, did not outright request a change of classification. Rather, counsel indicated that the petitioner intended to pursue the original classification. Counsel requested the change only in the event that the petition was found to be unapprovable under the classification initially sought. Thus, in effect, the petitioner sought two adjudications of a single immigrant petition, rather than merely a correction of a misclassified petition.

The Administrative Appeals Office will not perform an initial adjudication of the petition under section 203(b)(3) of the Act, because initial adjudication of this kind is under the director's jurisdiction. We must reject, therefore, counsel's assertion that the appeal should be sustained under the lower classification, because to do so would amount, in effect, to a wholly new adjudication rather than an appellate decision on an existing finding by the director.

Even if the director had complied with counsel's conditional request for reclassification of the petition, the petitioner may have had to amend the labor certification, in order to clarify that the petitioner's requirement regarding the "equivalent" of a bachelor's degree. Leaving aside the other documents in the record, it is not clear from the ETA-750A itself that the petitioner will consider an applicant with no computer-related degree at all. The form, rather, specifies four years of college education in a computer-related field of study. It is incumbent on the employer to specify what it considers to be the "equivalent" of a bachelor's degree, and without such information, the labor certification appears to be deficient.

The approved labor certification, meanwhile, remains valid and can still be submitted with a new petition seeking a more appropriate classification. The priority date for any petition approved with that labor certification would be unaffected, pursuant to *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.